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Docket Number

SUPREME COURT OF THE UNITED STATES

VIRGILIO JERONIMO-BAUTISTA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals, Tenth Circuit's decision to reverse the trial court's dismissal of the indictment against Petitioner, is in conflict with decisions from other United States Courts of Appeal decisions.

2. Whether the United States Court of Appeals, Tenth Circuit misapprehended the constitutionality of 18 U.S.C. § 2251(a) in finding that Petitioner "engage[d] in sexually explicit conduct for the purpose of producing visual depictions of such conduct . . . using materials that have been . . . transported in interstate or foreign commerce," in violation of 18 U.S.C. § 2251(A)," and that such is constitutional under the Commerce Clause. United States v. Jeronimo-Bautista, 425 F. 3d 1266 (10th Cir. 2005).

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CITATIONS OF OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit b. w was published. It was entered on March 24, 2005, under United States v. Jeronimo-Bautista, docket #04-4137, found at 425 F.3d 1266 (10th Cir., 2005). A copy of this decision is attached in the appendix hereto.

The Order and Judgment of the United States District Court for the District of Utah, Central Division was published. It was entered on May 20, 2004, under United States v. Jeronimo-Bautista, docket #2:04-CR-81 TC, found at 319 F.Supp. 2d 1272 (D. Utah 2004). A copy of this decision is attached in the appendix hereto.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is defined in Article III of the Constitution of the United States. The Tenth Circuit Court of Appeals entered its Order and Judgment reversing the District Court's dismissal of the indictment and remanding to the District Court on October 12, 2005. A Petition for Panel Rehearing or Rehearing En Banc was denied on December 2, 2005. The United States Supreme Court has jurisdiction to review this order and judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The United States Constitution, Article I, provides Congress with the authority "to regulate Commerce with foreign Nations, and among the several states . . . "

18 United States Code, § 2251, states:

> "(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession

of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed."

18 United States Code, § 2252(a)(4)(b), states:

"(a) Any person who- -
(4) either- -
(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if- -
(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(ii) such visual depiction is of such conduct;
shall be punished as provided in subsection (b) of this section.

STATEMENT OF THE CASE

Petitioner was charged in Federal court with causing a minor to engage in sexually explicit conduct "for the purpose of producing visual depictions of such conduct . . . using materials that have been . . . transported in interstate and foreign commerce," in violation of 18 U.S.C. § 2251(a) [hereinafter § 2251(a)]. Petitioner challenged the prosecution, and upon motion, the district court dismissed the charge, concluding that § 2251(a), as applied to the specific facts of this case, exceeds Congress' authority under the Commerce Clause. (Appendix, See Order of May 20, 2004).

The Government appealed the dismissal to the Tenth Circuit Court of Appeals, and the Court of Appeals reversed and remanded. Petitioner applied for a rehearing and was denied. The matter was briefed by the parties in the Tenth Circuit Court of Appeals, and the Tenth Circuit entered its Opinion on October

12, 2005, reversing and remanding. (See Order of October 12, 2005).

ARGUMENT

POINT I: STANDARD OF REVIEW

Defendant's entire appeal is based upon an analysis of his rights under the United States Constitution. For this reason, he was entitled to de novo consideration of all issues raised in this appeal below.

POINT II:COMMERCE CLAUSE

Article I, Section 8, Cl. 3 of the United States Constitution provides that Congress has the power "to regulate Commerce with foreign Nations, and among the several states. ."

There is a division in the Circuits as to the proper interpretation of the Commerce Clause, as applied to the statute in issue. The division is in the way the different Circuits have interpreted the constitutionality of the Sexual Exploitation of Children Act (hereinafter "the Act"), 18 U.S.C. § 2251(a). For example, in United States v. Corp, 236 F.3d 325, 332 (6th Cir.

2001), the Court of Appeals reversed the Defendant's conviction under the analogous possession statute, § 2252(a), based on the finding that the Defendant's

> activity was not of a type demonstrated substantially to be connected or related to interstate commerce on the facts of this case. Under the undisputed circumstances here, Corp [Defendant] was not involved, nor intended to be involved, in the distribution or sharing with others of the pictures in question.

The Sixth Circuit Court of Appeals found, as applied to that Defendant, that § 2252(a), was unconstitutional because he never intended to be involved in the distribution of the materials across state lines. That Court had serious concerns about the constitutionality of the Act, even though it failed to rule on the Act's facial constitutionality.

In Corp, the Defendant dropped off film to be developed at a local pharmacy. Employees there, upon seeing that the photographs were "pornographic shots of young females,"

notified local police. The two females were eventually identified by law enforcement as students at the local high school in Reed City, Michigan. Police obtained a search warrant for the Defendant's home, and upon execution, found the photographs. Defendant was subsequently charged with three counts of producing child pornography and one count of possession of child pornography. That Court noted that "federal jurisdiction was based on the fact that the photographic paper on which the pornography was produced was manufactured out-of-state, specifically in Germany." Id. at 326.

That Defendant challenged the constitutionality of § 2252(a)(4)(B) on its face, as an overreach of the Commerc Clause, and as applied in this case, because of an insufficient nexus with interstate commerce. In analyzing the constitutionality of § 2252(a)(4)(B), the Sixth Circuit went through the usual Lopez[1] and Morrison[2] analysis to determine the

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[1] United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), striking down the Gun-Free School Zones Act and explained that Congress has the authority to regulate three broad categories of activity: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities